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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ALBERTO GONZALEZ FIGUEROA, JR. Defendant and Appellant.	D068143 (Super. Ct. No. SCS263789)

APPEAL from a judgment of the Superior Court of San Diego County, Theodore M. Weathers, Judge. Affirmed.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Alberto Gonzalez Figueroa, Jr., of first degree murder (Pen. Code,[1] § 187, subd. (a)) and torture (§ 206) after he stabbed his brother to death with a samurai sword and carving fork. The trial court instructed the jury regarding self-defense, but denied defendant's request to also instruct the jury regarding provocation and heat of passion as a means of reducing first degree murder to second degree murder or murder to manslaughter. Defendant contends this was error. We agree, but conclude the error caused defendant no prejudice. Defendant also contends insufficient evidence supports his torture conviction. We disagree and affirm the judgment.[2]

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Case*

In April 2013, 35-year-old defendant lived in a two-bedroom condo unit in Chula Vista with his mother (Minerva Gonzalez Figueroa), grandfather (Leon Gonzalez), and 24-year-old younger brother (Mario Figueroa). Minerva and Leon originally moved into the unit by themselves, but were later joined by Mario, and then by defendant. Leon slept in the master bedroom; Minerva and Mario shared the other bedroom (Minerva slept on a bed, Mario on a folding bed on the floor); and defendant slept on a sofa bed in the living room. Mario looked up to defendant, who was taller and stronger.

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1 Undesignated statutory references are to the Penal Code.

2 Defendant makes an additional claim of error conditioned on our reversal of his torture conviction. Because we are not reversing the torture conviction, we do not address that argument.

It was undisputed at trial that on April 2, 2013, defendant stabbed Mario to death with a samurai sword and carving fork in Mario's bedroom. The key disputes were whether defendant had done so out of self-defense, and whether he had tortured Mario.

A. *Three Prior Incidents*

To establish motive and intent, the prosecution introduced evidence of three incidents involving defendant and Mario in December 2012 and January 2013.

On December 4, 2012, Minerva called 911 to report that she suspected defendant was on drugs and was "scaring the shit out of us." Minerva locked Leon in his bedroom, and locked herself and Mario in theirs. When police arrived, they saw through a window that defendant was holding a steak knife. When defendant noticed the police, he set down the knife and cooperated. He did not appear to the police to be under the influence. Minerva sought unsuccessfully to have the police remove defendant from the property.

Later in December, defendant and Mario argued after defendant confronted Mario for not washing his own dishes. Mario told defendant, "Let's take it outside." Even Minerva told her sons to "take it outside" so they would not fight in their home. The brothers went outside and argued more, until a neighbor who is a police officer intervened. Minerva testified defendant and Mario stopped speaking to each other because of this incident.

On January 18, 2013, defendant came home drunk, despite Minerva's prior request that he not drink alcohol while staying with her. Defendant was falling over and breaking furniture and other items. He became hostile and lunged and grabbed at Minerva, telling her to "shut up, bitch." Mario intervened nonviolently to protect Minerva. Defendant

tried to retrieve a black bag in which Minerva knew he kept several kitchen knives and screwdrivers. Mario restrained defendant, wrestled him to the ground, and sat on him. Mario was having trouble restraining defendant, so he told Minerva to call 911, which she did (three times). When the police arrived, Mario was still struggling to restrain defendant and asked the officers for help. Police intervened and arrested defendant.

When defendant returned home after his arrest, he was upset with Mario and Minerva. He stopped calling Minerva "mom," and he had "absolutely no communication" with Mario. As defense counsel put it, "you could probably cut the tension with a knife . . . ." The brothers never reconciled or spoke to each other.

Minerva testified defendant told her after the January 18 incident that he was upset because "he thought that [she] was picking Mario over him." Minerva also testified that when defendant was 13 or 14 years old, she moved with Mario and her two daughters to Seattle, where they lived for about 10 years. Defendant stayed in San Diego with his father.

After the January 18 incident, Mario suggested to Minerva that they relocate his set of three samurai swords, which were on a display stand behind the television in the living room. Mario explained he did not want defendant "to have something easy to reach for" if they got into another fight. Minerva agreed and put the swords underneath the mattress of her bed. She began to sometimes lock her bedroom door at night, and considered evicting defendant.

B. *April 2, 2013*

On the morning of April 2, 2013, Minerva followed her normal routine. She woke at 6:00 a.m. and got ready for work. Before she left at about 7:00 a.m., Mario yelled out, " 'Bye mom. I love you. Have a good day.' " Minerva saw defendant—who was normally a heavy and late sleeper—lift his head and look at her from under the covers before putting the covers back over himself. Minerva did not say goodbye to defendant because they were still "upset with each other" and "were a little estranged."

A few minutes later, neighbor Veronica Mader was watching television in her condo with the doors and windows closed. She thought she heard someone screaming, but "[a]t the beginning . . . didn't pay too much attention." When she heard it again, she muted the television. This time, Mader heard someone screaming—in "a very painful voice"—" 'Help, help. Why are you doing this to me?' " She took her phone, ran outside, and yelled through the window of defendant's condo to ask if anyone needed help. She heard nothing. Mader called 911 at 7:18 a.m. She returned to her condo and quickly prepared her children for school to get them out of the complex.

Leon, who was then 87 years old and had hearing difficulties, had awakened at 7:00 a.m. to take medicine and was resting in his bed when he heard Mario screaming for help. Mario sounded scared; Leon had never heard him scream like that before. Leon got up, went to Mario's bedroom, opened the door, and saw defendant on top of Mario with his knee on Mario's chest. Leon placed a hand on defendant's shoulder, and Mario looked at him and pleaded, "Help me, grandfather." Leon saw defendant striking Mario's head and face with his right hand, but could not see if defendant had any weapons. Leon

never saw Mario hit defendant or hold any weapons. Leon told defendant to leave Mario alone. Defendant told Leon, "There is nothing going on," and made a hand gesture for Leon to leave. Leon left the room. Defendant never asked Leon for help.

Leon went to the bathroom, then tried to call the police on his cell phone but was having trouble seeing the numbers. Before Leon could call, he encountered defendant in the hallway. Defendant asked Leon what he was doing with the phone. When Leon said he was going to call the police, defendant took the phone from him, opened the door to Mario's bedroom, and threw the phone into the room. Defendant seemed calm to Leon. Leon pointed out to defendant that defendant had blood on his shorts; defendant did not respond. Leon told defendant he was going to go outside to get some fresh air, but he really intended to have a neighbor call the police. A neighbor called 911 for Leon at 7:24 a.m.

About five minutes after she called 911, neighbor Mader was heading to her car to take her children to school when she observed defendant in the open doorway of his condo getting a bag out of a closet. She asked defendant if he was okay. He "very calm[ly]" replied, "Yeah. I'm fine. I'm fine." Mader told defendant she had called 911 because she thought something was wrong. Defendant did not respond, but as Mader was backing her car out, she saw defendant leaving in a rush—so much so that he ran in front of her car and she had to apply the brakes. Defendant never asked Mader for help.

Another neighbor, Darnella Hosch, was walking her dog in the condo complex when she saw defendant riding a bicycle and wearing a backpack. When Hosch said "good morning" to defendant, he seemed "very nervous" and almost fell off his bicycle.

Hosch noticed blood on defendant's leg as he was "racing past" her. Defendant did not ask Hosch for help.

Chula Vista police officers responding to the 911 calls entered the family's condo and found Mario unresponsive and covered in blood. The officers notified dispatch, who sent paramedics to the scene. Paramedics pronounced Mario dead at the scene at 7:42 a.m.

Chula Vista dispatchers broadcasted that there had been a murder and identified defendant as the suspect. As dispatchers were describing defendant, he rode by a National City police officer about eight miles from the crime scene. The officer detained defendant at gunpoint. Defendant had blood on his shoes, calf, shorts, hands, arms, cheek, and head. There was also fecal matter on defendant's shorts. Defendant had a small wound on a knuckle on his right hand, an injury to the middle knuckle of his left ring finger, and an injury on his chest and left shoulder. His backpack contained two screwdrivers, a knife, and a glove, none of which had blood on them.

C. *Crime Scene Evidence*

Investigators found no signs of struggle anywhere in the family's condo. Behind the closed door of Mario's bedroom, they observed Mario's body, covered in blood, face-up atop bedding, on the floor. One of Mario's legs was still partially beneath his bedding.

Under the bedding, investigators found a carving fork and samurai sword. There was blood on the carving fork, and its tines were bent. The sword was "covered in" blood, and its blade was bent.

Mario's blood had pooled under his body and soaked through the bedding, a rug, the carpet, and the carpet pad, ending up on the concrete subfloor. The sword had stabbed through the bedding and carpeting and chipped the subfloor. There were droplets of blood throughout the room. Investigators found two samurai swords and one sheath between the mattress and box spring of Minerva's bed.

Elsewhere in the family's condo, investigators found a pair of shorts in the washing machine with blood and fecal matter on them. They also found a glove with blood on it on the kitchen counter.

Mario's DNA matched blood samples taken from the fork, the sword, the glove, the bedroom walls, and defendant's leg.

D. *Medical Evidence*

Glenn Wagner, M.D., the Chief Medical Examiner of San Diego County, conducted the autopsy on Mario. He had previously conducted about 14,000 autopsies. In addition to extensive bruising to Mario's face and scalp, Dr. Wagner observed that Mario suffered 38 wounds that were consistent with having been inflicted by the carving fork and samurai sword.[3]

Mario had 12 puncture wounds—consistent with having been inflicted by the carving fork—on his neck, face, shoulder, and back. Dr. Wagner stated none of these

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3 Dr. Wagner clarified that this total was not indicative of the total number of *blows* "[b]ecause you got fork injuries—so it's half of that—and at least two of the chest wounds are through and through . . . ."

wounds were "particularly deep" or life-threatening, but would "[h]urt, probably, for sure."

Mario suffered 10 incised wounds (lacerations longer than they are deep) under his chin, and on his cheeks, ear, scalp, and forearm. Dr. Wagner indicated many of these wounds appeared to have been inflicted when Mario was defending himself or moving.

Mario also suffered 16 stab wounds (wounds deeper than they are long), five of which would independently have been fatal. The stab wounds punctured both of Mario's lungs; cut his heart and aorta; and damaged his trachea, esophagus, spleen, and one kidney.

Regarding sequence, Dr. Wagner opined Mario first suffered blunt force injuries to his head and face, then puncture wounds inflicted by the carving fork, then the incised wounds, then the stab wounds. Dr. Wagner further opined Mario's earlier injuries were inflicted while he was face-down, and the later injuries were inflicted after he turned face-up. Dr. Wagner opined they were all inflicted while Mario was alive, and that they would have caused "pretty extreme pain." Dr. Wagner determined Mario bled to death over the course of about 10 to 20 minutes.

Dr. Wagner also testified about defendant's injuries. He opined the injuries to defendant's hands were consistent with defendant punching something, and holding a knife that slipped. The wounds on defendant's chest were superficial.

II. *Defense Case*

Defendant testified as the only defense witness. He admitted killing Mario, but claimed it was in self-defense.

A. *Three Prior Incidents*

Defendant addressed and downplayed the significance of the December 2012 and January 2013 incidents. Defendant surmised his mother called police during the December 4 incident because he had his music or the television too loud. He explained he was holding a knife when police arrived because he was cutting steak.

Regarding the second December incident, defendant initially testified he politely asked Mario to clean up after himself, but later acknowledged he might have said, "Why don't you clean your shit up, man.' " Mario became defensive and challenged defendant to a fight. Defendant admitted "there was kind of a distance" between him and Mario after that incident.

Defendant admitted he came home drunk on January 18, 2013, but stated he apologized to Minerva and reconciled with her. Defendant and Mario, however, never had another conversation with each other and kept their distance. Defendant acknowledged he felt like he "was treated like just somebody that wasn't part of the family." He described Mario as the "little enforcer" who was "just creeping over [defendant's] shoulder 24/7." Defendant said he and Mario had no altercations between January 18 and April 2.

B. *April 2, 2013*

Defendant woke to the sound of Minerva and Mario's voices on April 2. He saw Minerva leave for work, but stayed in bed to decide what kind of exercise he would do. He got up, made up the sofa bed and folded it away, put on his shoes and shorts (but no shirt), and headed toward the bathroom. As defendant walked quickly down the hall, he

and Mario unexpectedly and "rough[ly]" bumped into each other. The collision was followed by an immediate, "heated," expletive-laden exchange. Defendant continued on to the bathroom, where he resolved to avoid any further confrontation with Mario.

Defendant decided to start a load of laundry before leaving to work out. Some of Minerva's sheets were in the dryer, so defendant was going to take them into her and Mario's room. He went to the room to open the door *without* the laundry because it would be too hard to open the door if his hands were full.

When defendant opened the bedroom door, Mario was standing with his back to him. Mario appeared startled, jumped around, and yelled, "What the fuck, motherfucker. I thought I fucking told you . . . ." As Mario turned, defendant saw that he was holding a carving fork in one hand and a samurai sword in the other.[4] Defendant "just went blank from there" and "tuned everything out." Mario swung the carving fork and hit defendant's hand. Defendant closed his eyes, went straight toward Mario, and started punching. Defendant said he was "shocked" and "scared shitless," literally—he defecated in his shorts.

Defendant's hands struck Mario and the men got tangled up in Mario's bedding and fell to the floor. Defendant's mind "went blank" as he felt he was "fighting for [his] life." He felt a pain or rush in his body and thought he had been stabbed. He "couldn't focus on anything." Defendant testified he blanked out and could not recall the details of

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[4] Defendant testified that although he grilled food on the barbeque "almost every day," he had never seen this particular carving fork before. He also testified he knew Mario had samurai swords, but claimed to have never seen the set of three that had previously been stored in the living room where defendant slept.

the attack, but claimed he was in fear for his life every time he stabbed Mario. He claimed he did not hear Mario screaming for help.

Defendant said he "came back to [his] senses" when Leon entered the room as defendant and Mario were fighting over the fork. Defendant was worried Leon would trip and fall, so defendant said in Spanish, "No, no, grandpa. Everything is okay. Don't you worry." Leon pointed out that defendant had blood on his shorts. Defendant then saw Mario was coughing up blood and moving his hand near a knife and some screwdrivers under Minerva's bed, so defendant picked up those items.

After Leon left the room, defendant left as well to make sure Leon was okay. He saw Leon trying to make a phone call and took the phone to help him. When the "phone wasn't working or anything," defendant opened the door to Mario's bedroom and threw the phone inside the room. Defendant admitted he did not know why he did that. When defendant opened the door, he could only see the lower part of Mario's body, which "was just laying there."

Defendant testified he put the knife and screwdrivers in his backpack because he was thinking, " 'I better hold onto these because what if [Mario] runs out of the room and attacks me again.' " However, defendant admitted he did not remove the carving fork or samurai sword from the bedroom. Defendant changed his shorts (because they had blood and feces on them) and rode off on his bike to look for Leon because he was concerned for Leon's safety.

Defendant acknowledged he must have inflicted all of Mario's wounds, but said he was merely defending himself. Defendant said he did not recall how he inflicted each

injury because he was in shock when it happened. Defendant admitted he never went back to check on Mario or summoned help for him.

Defendant testified the wound on one of his knuckles was from the fight with Mario. He acknowledged that, despite being in a fight for his life, he had hardly any injuries.

III. *Rebuttal*

As its sole rebuttal witness, the prosecution called a police detective who was present when defendant was being processed for evidence. The detective testified that when defendant was asked how he received the injury on one of his hands, defendant said it happened when he fell off his bike.

IV. *Jury Verdict and Sentencing*

The jury found defendant guilty of first degree murder and torture, and found true the allegations he had personally used deadly and dangerous weapons in the commission of those offenses. Defendant admitted one prior prison term allegation. The trial court sentenced defendant to 25 years to life on the murder count, and imposed but stayed under section 654 a separate term of 25 years to life on the torture count.[5]

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[5] The court also accepted a guilty plea and sentenced defendant for an unrelated crime he committed while in custody for the instant offenses. Defendant does not raise in this appeal any aspect of those proceedings.

DISCUSSION

I. *Instructional Error*

Defendant contends the trial court erred prejudicially by rejecting his request to instruct the jury that a sudden quarrel or heat of passion can negate (1) the malice element of homicide, such that the jury should have been instructed on the lesser included offense of voluntary manslaughter; and (2) the premeditation and deliberation element of first degree murder, thereby reducing the offense to second degree murder. We agree that the trial court erred by not so instructing the jury, but find the error caused defendant no prejudice.

A. *Background*

During the jury instruction conference after the close of evidence, defense counsel requested that the court instruct the jury with CALCRIM Nos. 570 ("Voluntary Manslaughter: Heat of Passion—Lesser Included Offense")[6] and 522 ("Provocation:

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6 CALCRIM No. 570 provides: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up

Effect on Degree of Murder").[7] Defense counsel acknowledged the court would be instructing the jury regarding complete and imperfect self-defense, but argued self-defense and heat of passion are not mutually exclusive. He argued instruction on heat of passion was warranted because "the jury could feel that this was a sudden quarrel that happened, and that [defendant] acted because of that provocation with the knife, and acted rationally under the influence of the intense emotion that he was feeling at that time . . . . "

The trial court found there was insufficient evidence of provocation to support an instruction on heat of passion or provocation: "This case, and in a light most favorable to the defendant himself, is that the defendant . . . opened the door to the bedroom in order to place some laundry inside that bedroom and saw his brother's back to him. And the

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(his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] [If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.] [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

[7] CALCRIM No. 522 provides: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]"

brother then turned around with the weapons that the defendant described. [¶] It does not seem to the court to be a matter of provocation at all. I thought that the self-defense instructions were more appropriate, given the state of the evidence in this case. So the court has declined to give [CALCRIM Nos.] 570 and 522."

The court instructed the jury on homicide with CALCRIM Nos. 500 ("Homicide: General Principles"), 520 ("First or Second Degree Murder With Malice Aforethought"), 521 ("First Degree Murder"), 505 ("Justifiable Homicide: Self-Defense or Defense of Another"), 571 ("Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense"), 3472 ("Right to Self-Defense: May Not Be Contrived"), and 3474 ("Danger No Longer Exists or Attacker Disabled").

B. *Relevant Legal Principles*

First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation. (*Ibid*.) Malice may be express (intent to kill) or implied (intentional commission of a life-threatening act with conscious disregard for life). (*Ibid*.) To reduce the offense to second degree murder, premeditation and deliberation may be negated by heat of passion from provocation. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.)

Even when a defendant has the intent to kill or conscious disregard for life, a homicide may be further reduced to voluntary manslaughter in limited, explicitly defined circumstances that negate malice. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*);

People v. Barton (1995) 12 Cal.4th 186, 199 (*Barton*).) For voluntary manslaughter, malice is negated by the defendant's (1) heat of passion arising from provocation that would cause a reasonable person to react from passion instead of reason, or (2) unreasonable but good faith belief in the need to act in self-defense (imperfect self-defense). (*Moye*, at p. 549; *Barton*, at p. 199.) " 'Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that *otherwise inheres* in such a homicide [citation], voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder [citation].' " (*Moye*, at p. 549.)

"A heat of passion theory of manslaughter has both an objective and a subjective component." (*Moye, supra*, 47 Cal.4th at p. 549.) To satisfy the objective element of this form of voluntary manslaughter, "the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id.* at p. 550.) The inquiry on the subjective factor is not whether the provocation is "of a kind that would cause an ordinary person of average disposition *to kill*," but rather, "whether the person of average disposition would be induced to react from passion and not from judgment." (*People v. Beltran* (2013) 56 Cal.4th 935, 938-939 (*Beltran*); see *People v. Wright* (2015) 242 Cal.App.4th 1461, 1481-1482.) "To satisfy the subjective element . . . , the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Moye*, at p. 550.)

"[I]n a murder trial, the court, on its own motion, must fully instruct on every theory of a lesser included offense, such as voluntary manslaughter, that is supported by the evidence. [Citation.] Hence, where the evidence warrants, a murder jury must hear that provocation or imperfect self-defense negates the malice necessary for murder and reduces the offense to voluntary manslaughter." (*People v. Rios* (2000) 23 Cal.4th 450, 463, fn. 10 (*Rios*); see *People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude []" ' that the lesser offense, but not the greater, was committed." (*Breverman*, at p. 162.) The obligation to instruct on a lesser included offense exists even when that offense conflicts with a defendant's defense strategy. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085; *Breverman*, at pp. 162-163 ["substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself"]; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1138 ["even if the defendant testifies to a state of mind inconsistent with the theory of a lesser included offense, substantial evidence may still support an instruction on that offense"] (*Millbrook*).)

Self-defense and heat of passion are not mutually exclusive means of negating the malice element of murder. (*Millbrook*, *supra*, 222 Cal.App.4th at p. 1138 [" ' "[I]n the usual case," ' a heat-of-passion instruction ' "supplements the self-defense instruction." ' "].) This is so because the same provocation that may lead a person to believe he must kill to defend himself may also arouse the passions of a reasonable person. Thus, if the evidence can support a finding that the defendant killed with a good

faith but unreasonable belief in the need for self-defense, and also that the defendant killed because his reason was obscured by passion in response to the victim's objectively provocative conduct, the trial court should instruct on both imperfect self-defense and heat of passion. (*Breverman, supra,* 19 Cal.4th at pp. 148-149, 153-154, 163-164.) In *Breverman,* for example, instructions on both theories were required based on evidence showing that a group of men acted in a taunting, menacing manner in front of the defendant's home (including battering his car with weapons), in response to which the defendant, experiencing fear and panic, shot through a window pane and then came outside and continued shooting toward the fleeing vandals, fatally wounding one of the individuals. (*Id.* at pp. 148, 150-151, 163-164.)

In contrast, if there is evidence that the defendant engaged in self-defense, but no evidence that he acted rashly from strong passion rather than judgment, the trial court is not required to instruct on heat of passion in addition to imperfect self-defense. (*Moye, supra,* 47 Cal.4th at pp. 551, 554.) Thus, in *Moye* the court concluded there was no duty to instruct on heat of passion given the defendant's "blow-by-blow recounting of events in which he characterized every swing he took with the bat as a defensive response to each of [the victim's] successive advances." (*Ibid.*) The court explained, "[A]n instruction on heat of passion is [not] required in every case in which the *only* evidence of unreasonable self-defense is the circumstance that a defendant is attacked and consequently fears for his life. In *Breverman* there was affirmative evidence that the defendant panicked in the face of an attack on his car and home by a mob of angry men and had come out shooting, and continued shooting, even after the group had turned and ran . . . . Here, in contrast,

defendant testified he acted deliberately in seeking to defend himself from each successive advance by the victim . . . ." (*Id.* at p. 555.)

We determine de novo whether an instruction on a lesser included offense should have been given, viewing the evidence in the light that most favors a duty to give the instruction, and without evaluating the credibility of witnesses. (*People v. Koontz, supra*, 27 Cal.4th at p. 1085; *Breverman, supra*, 19 Cal.4th at pp. 162-163.)

C. *Heat of Passion Voluntary Manslaughter*

1. *The Trial Court Erred by Not Instructing the Jury Regarding Heat of Passion*

We agree with defendant that a heat of passion instruction was warranted. Under defendant's version of the incident, the jury could reasonably conclude that an ordinarily reasonable person would be provoked to act from passion instead of reason if attacked with a carving fork by someone who is also brandishing a samurai sword and yelling profanities. For example, in *Barton, supra*, 12 Cal.4th 186, the California Supreme Court found a reasonable jury could conclude that "an ordinarily reasonable person" could "act rashly and without reflection" in shooting a victim who had just tried to run the victim's daughter off the road, spat on the window of her car, called her "a 'bitch,' " acted " 'berserk,' " and appeared to be armed with a knife. (*Id.* at p. 202.) And in *Breverman, supra*, 19 Cal.4th 142, the Supreme Court determined that a reasonable jury could find that "a person of average disposition" would be "aroused to passion" and have his "reason . . . obscured" by a group of young men—one armed with a knife, one with a bat, and one with part of a "Club" automobile security device—behaving in a menacing manner and battering the defendant's car in his driveway. (*Id.* at pp. 150, 148-149, 153-

154, 163-164.) Thus, defendant's testimony that Mario hit him with the carving fork while holding the samurai sword and yelling profanities constitutes substantial evidence of the *objective* component of heat of passion.

The Attorney General's assertion that "no reasonable person is provoked *into a homicidal rage* by seeing someone holding a grilling tool or knife" misses the mark. (Italics added.) As noted, the issue is not whether the provocation is "of a kind that would cause an ordinary person of average disposition *to kill*," but rather, "whether the person of average disposition would be induced to react from passion and not from judgment." (*Beltran, supra*, 5 Cal.4th at pp. 938-939.)

Defendant's testimony also constitutes substantial evidence of the *subjective* component of heat of passion. Defendant testified repeatedly that he was in "shock," "went blank," "couldn't focus," and lost his senses and control of his bowels. This is akin to the "affirmative evidence [in *Breverman*] that the defendant panicked in the face of an attack . . . ." (*Moye, supra*, 47 Cal.4th at p. 555.) In addition, defendant's concession that he inflicted all of Mario's wounds but, due to shock, could only recall "some glimpses" of them distinguishes this case from *Moye*, where the defendant's "*blow-by-blow* recounting of events . . . characterized *every swing* he took with the bat as a defensive response to each of [the victim's] successive advances." (*Id.* at p. 554, italics added.) Finally, the prosecutor acknowledged defendant's state of mind when he repeatedly asserted during closing argument (albeit in the context of negating self-defense) that Mario's injuries showed defendant acted with "rage" and "passion."

Because the record contains substantial evidence of both components of heat of passion, the trial court erred by not instructing the jury on that theory.

2. *The Error Was Not Prejudicial*

The parties disagree on the applicable standard for assessing prejudice—defendant contends the *Chapman*[8] standard applies, while the Attorney General contends the *Watson*[9] standard applies.

Although the California Supreme Court acknowledges it has not yet decided this issue (see *Moye, supra,* 47 Cal.4th at p. 558, fn. 5), the issue was clearly raised and fully briefed to the Court of Appeal in *People v. Thomas* (2013) 218 Cal.App.4th 630. There, the defendant shot and killed the victim after an altercation about parking at an apartment complex. The trial court instructed the jury regarding imperfect self-defense, but denied the defendant's request to also instruct on heat of passion. (*Id.* at pp. 644-645.) The Court of Appeal concluded this was error, but initially found no prejudice under the *Watson* standard. (*Thomas,* at p. 633.) Thereafter, the California Supreme Court granted the defendant's petition for review and transferred the case back to the Court of Appeal " 'with directions to address defendant's contention that the trial court's refusal to instruct

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8 *Chapman v. California* (1967) 386 U.S. 18, 24 ["before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].

9 *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal required only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error"].

on heat of passion voluntary manslaughter constituted federal constitutional error' " subject to the *Chapman* standard. (*Thomas*, at p. 633.)

Following transfer, the Court of Appeal concluded the *Chapman* standard of assessing prejudice applied. (*Thomas, supra*, 218 Cal.App.4th at pp. 633, 642-644.) The court explained, "When malice is an element of murder and heat of passion or sudden provocation is put in issue, the federal due process clause requires the prosecution to prove its absence beyond a reasonable doubt." (*Id.* at p. 643, citing *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 (*Mullaney*).) The court continued, "Thus, in California, when a defendant puts provocation in issue by some showing that is sufficient to raise a reasonable doubt whether a murder was committed, it is incumbent on the prosecution to prove malice beyond a reasonable doubt by proving that sufficient provocation was lacking." (*Thomas*, at p. 643, citing *Rios, supra*, 23 Cal.4th at pp. 461-462.) The court observed, "*Mullaney* compels the conclusion that failing to so instruct the jury is an error of federal constitutional dimension." (*Thomas*, at p. 643.) Consequently, the *Thomas* court concluded that because " '[j]ury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution' " (*id.* at p. 644, quoting *People v. Flood* (1998) 18 Cal.4th 470, 491), the "[f]ailure to instruct the jury on heat of passion to negate malice is federal constitutional error requiring analysis for prejudice under *Chapman*" (*id.* at p. 644).

Applying the *Chapman* standard, the *Thomas* court found the trial court's failure to instruct on heat of passion manslaughter was prejudicial, and reversed. (*Thomas, supra*,

218 Cal.App.4th at pp. 646-647.) The Attorney General petitioned the California Supreme Court for review, but the court denied the petition. (*Millbrook, supra*, 222 Cal.App.4th at pp. 1145-1146.)

We find the *Thomas* court's reasoning persuasive and, in applying it to this case, conclude the trial court's denial of defendant's request to instruct the jury regarding heat of passion was federal constitutional error requiring assessment for prejudice under the *Chapman* standard. Here, consistent with *Thomas*, provocation was put at issue by defendant's testimony and by defense counsel's reference during his opening statement to the events of April 2 as a "sudden quarrel." Thus, it was the People's burden in proving malice to prove beyond a reasonable doubt "that sufficient provocation was lacking." (*Thomas, supra,* 218 Cal.App.4th at p. 643.)

Under the *Chapman* standard, we find the instructional error was not prejudicial. " 'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' " (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) Error in failing to instruct the jury "is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) "In addition, closing arguments to the jury are relevant in evaluating prejudice." (*People v. Chavez* (2004) 118 Cal.App.4th 379, 388.)

The jury was instructed with CALCRIM No. 505 regarding complete self-defense,[10] and CALCRIM No. 571 regarding imperfect self-defense.[11] The jury also heard defendant's extensive trial testimony in support of these defenses and had the opportunity to evaluate his credibility. By rejecting these defenses and finding defendant guilty of first degree murder, the jury necessarily disbelieved defendant's version of events. Otherwise, the jury would have convicted defendant, *at most*, of voluntary manslaughter on an imperfect self-defense theory.

This conclusion is further supported by the fact the jury found defendant guilty of first degree murder, which the jury was instructed required a finding that defendant killed Mario with premeditation and deliberation.[12] CALCRIM No. 521 specifically provides

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10 CALCRIM No. 505 provides in part: "The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against the danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger."

11 CALCRIM No. 571 provides in part: "The defendant acted in imperfect self-defense if: [¶] 1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable."

12 The jury was also instructed that it could find defendant guilty of first degree murder if it found the murder was committed by torture or by lying in wait. (§ 189 ["All murder which is perpetrated by means of . . . lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing . . . is murder of the first degree."].) Provocation is irrelevant to these theories. (See *People v. Battle* (2011) 198 Cal.App.4th 50, 75 ["if the jury found murder by lying in wait, provocation was irrelevant because the murder could not be reduced to second degree murder"]; *People v. Seaton* (2001) 26

that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." By finding that defendant premeditated and deliberated Mario's death, the jury necessarily concluded he did not act rashly or impulsively in the heat of passion. (*People v. Wharton* (1991) 53 Cal.3d 522, 572 ["By finding defendant was guilty of first degree murder, the jury necessarily found defendant premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion . . . and clearly demonstrates that defendant was not prejudiced by the failure to give his requested instruction."].)

In addressing CALCRIM No. 521 in closing argument, the prosecutor noted the instruction is inconsistent with heat of passion: "It just matters whether the killing is deliberate and premeditated. The amount of time may vary from person to person, how long they think about it and premeditate. *If it's made rashly or impulsively, right? We are talking like a heat-of-passion-type thing. Then maybe that's not deliberate and premeditated*." (Italics added.) This statement minimized any potential prejudice.

In light of the record, the jury instructions, the jury's verdict, and the arguments of counsel, we conclude the trial court's failure to instruct the jury regarding heat of passion voluntary manslaughter was harmless beyond a reasonable doubt.

Cal.4th 598, 665 [killing in commission of felonies enumerated in § 189 constitutes first degree murder even if killer acted in imperfect self-defense].)

D. *Second Degree Murder*

Having determined that defendant presented substantial evidence of provocation for purposes of heat of passion voluntary manslaughter, we conclude he was also entitled to an instruction regarding provocation to negate premeditation and deliberation for purposes of allowing the jury to find second degree murder. (See *People v. Padilla* (2002) 103 Cal.App.4th 675, 678 [provocation for purposes of reducing murder from first degree to second degree bears only a subjective component].) However, for the same reasons just discussed, we conclude this error caused defendant no prejudice.

II. *Substantial Evidence of Torture*

Defendant contends insufficient evidence supports his torture conviction. We disagree.

" 'The standard of appellate review for determining the sufficiency of the evidence is settled. On appeal, " 'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" [Citation.] In conducting such a review, we " 'presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" [Citations.] "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we

look for substantial evidence." ' " (*People v. Harris* (2013) 57 Cal.4th 804, 849 (*Harris*).) "If our review of the record shows that there is substantial evidence to support the judgment, we must affirm, even if there is also substantial evidence to support a contrary conclusion and the jury might have reached a different result if it had believed other evidence." (*People v. Riley* (2015) 240 Cal.App.4th 1152, 1165-1166.)

The crime of torture under section 206 has two elements: "(1) the infliction of great bodily injury; and (2) the specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (*People v. Massie* (2006) 142 Cal.App.4th 365, 370-371 (*Massie*).)[13] Torture "focuses on the mental state of the perpetrator and not the actual pain inflicted." (*People v. Hale* (1999) 75 Cal.App.4th 94, 108 (*Hale*); § 206 ["The crime of torture does not require any proof that the victim suffered pain."].) The terms revenge, extortion, and persuasion are "self-explanatory." (*Massie*, at p. 371.) The phrase "sadistic purpose" means "[inflicting] pain on another person for the purpose of experiencing pleasure." (*People v. Raley* (1992) 2 Cal.4th 870, 901.) Although a sadistic purpose *can* include sexual pleasure, it need not. (*People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1203.)

"Torture does not require the defendant act with premeditation and deliberation, and it does not require that he intend to inflict prolonged pain." (*Massie, supra*, 142

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13 Section 206 states: "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain."

Cal.App.4th at p. 371; see *Hale, supra*, 75 Cal.App.4th at p. 108.)[14] "The intent with which a person acts is rarely susceptible of direct proof and usually must be inferred from facts and circumstances surrounding the offense." (*Massie*, at p. 371; see *People v. Pre* (2004) 117 Cal.App.4th 413, 420.) "Intent to cause cruel or extreme pain can be established by the circumstances of the offense and other circumstantial evidence." (*Pre*, at p. 420.) The "length of time over which the offense occurred" and "the severity of the wounds inflicted" are "relevant but not necessarily determinative." (*Massie*, at p. 371; see *Hale*, at pp. 107-108.)

Viewing the record in the light most favorable to the judgment (*Harris, supra*, 57 Cal.4th at p. 849), we conclude substantial evidence supports defendant's torture conviction. There is little question defendant inflicted great bodily injury on Mario. (See *Hale, supra*, 75 Cal.App.4th at p. 108 [" 'Abrasions, lacerations and bruising can constitute great bodily injury.' "].) Defendant inflicted bruises, 12 puncture wounds, 10 incised wounds, and 16 stab wounds. The stab wounds injured many of Mario's vital organs. Thus, substantial evidence supports the first element of torture.

Substantial evidence also supports the second element of torture—that defendant intended to cause Mario cruel or extreme pain and suffering for the purpose of revenge. Regarding intent, the record supports a reasonable inference that defendant attacked Mario when he was vulnerable, lying face down in his bed. (See *Hale, supra*, 75

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14 By contrast, murder by means of torture (§ 189) requires a "calculated deliberation" to inflict "extreme and prolonged pain." (*Massie, supra*, 142 Cal.App.4th at pp. 371-372; see § 206.)

Cal.App.4th at p. 106 [the fact that attack began while victim was asleep and continued after defendant awoke screaming supported inference that defendant intended to cause cruel physical pain].) Dr. Wagner opined (and defendant concedes on appeal) the first 12 wounds were inflicted on Mario's neck, face, shoulder, and back with the carving fork. Those wounds were not "particularly deep" or life-threatening, but would "[h]urt, probably, for sure."

The next wounds were the 10 nonfatal incised wounds defendant inflicted under Mario's chin, and on his cheeks, ear, scalp, and forearm. Defendant then inflicted 11 nonfatal stab wounds and five fatal ones.

Dr. Wagner testified all the wounds were inflicted while Mario was alive and would have caused him "pretty extreme pain" for the not-insubstantial 10 to 20 minutes it would have taken him to bleed to death. That Mario was in such pain would have been obvious to defendant. Mario screamed—in "a very painful voice"—"Help, help. Why are you doing this to me?" He screamed so loudly that a neighbor heard him in her closed condo over the sound of her television. Leon also heard the distinctive screaming despite his hearing difficulties. Yet defendant continued attacking despite Mario's distressed screams.

The fact that defendant inflicted so many nonfatal—yet "extreme[ly] pain[ful]—wounds when he had available the lethal samurai sword supports the reasonable inference that defendant intended to inflict cruel or extreme pain and suffering before finally delivering the coup de grâce.

Substantial evidence also supports the jury's finding that defendant's motive was revenge. Defendant admitted his relationship with Mario became distant after the second December incident, and that he was upset with Mario after defendant was arrested in January—after which the brothers had "absolutely no communication" and never reconciled. Defendant acknowledged he felt like he "was treated like just somebody that wasn't part of the family." And he described Mario as the "little enforcer" who was "just creeping over [defendant's] shoulder 24/7." Minerva testified defendant told her he was upset because "he thought that [she] was picking Mario over him." All of this evidence supports the reasonable inference that defendant's attack on Mario was motivated by revenge.

In sum, substantial evidence supports defendant's conviction for torture under section 206.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.